

Oct. 1, 2005

To:

Bureau of Land Management

Billings, Mt.

This correspondence is response to your contacting me regarding my filing of water rights on my allotment or "fee lands." The Montana Water Court this past June upheld Montana law of the Prior Appropriation Doctrine that ranchers have vested water rights on federal land. The Mining Act of 1866 granted the ability to acquire water rights on federal land, as well as associated rights-of-way and the Act of 1872 amended the Act of 1866 to include reservoirs for all forms of agricultural use as well as for ditches and canals. I would refer you to the cases of U.S. v. New Mexico (1978) and Fallini v. Hodel concerning the issue of ownership of stockwater rights on federal land. Also, with regard to improvements, aside from the aforementioned laws, (USC s661 and s952-955) USC s315c, e, h, i (Range Improvement Trust Fund/Range Betterment Fund. These are compensable property rights under Federal Land Policy Management Act (FLPMA 1976-43 USC s1752g)

I have senior vested water rights to surface and ground water and have no intention of forfeiting or compromising these in any way. If you need further contact, please do so in writing. Thank you for your attention to this matter.

stakes a claim to the use of a given quantity of water. Starting in the nineteenth century, anyone in Washington could claim a right to take water from a river or stream by merely posting a notice on a tree. In fact, one could divert the water without even posting a notice. When a person diverted water from a stream, this physical appropriation established a claim to that portion of the stream's flow.

In case of conflicts, the person who first appropriated the water has priority, a scheme often dubbed "first in time, first in right." In the terminology of water law, the person who earlier gains a right to water has the "senior" right while the person who later acquires a right has the "junior" right. The date that one began to use the water is the "priority date" of one's water right. The state legislature's first comprehensive Water Code, adopted in 1917, codified this approach, confirming all existing rights but providing that future rights would be appropriated only through a state permit system.

One limit on the rights of prior appropriators is the doctrine of "beneficial use." This doctrine means that a water right is only as extensive as the legitimate use of water. In other words, a water right is not an absolute right of ownership to a specific amount of water. Rather it is the limited right to use only that water which is necessary to accomplish a constructive end associated with a specific parcel of land. Recognized "beneficial" uses include irrigation, domestic water supply, industry, and power generation. If water is wasted, then the water right excludes that portion of the water that is wasted. Also, if a water right holder wants to use more water, then a new right, with a later priority date, must be acquired.

Two other limits on water rights are embodied in the related doctrines of "relinquishment" and "abandonment." These doctrines reflect a corollary of the requirement of beneficial use: when water is no longer used for a beneficial purpose, the water right is lost. "Abandonment" is a common-law doctrine under which a water right is lost when a water right holder intentionally fails to use the water for an extended period of time. "Relinquishment" is a related statutory doctrine under which a water right is lost upon the voluntary failure to use a water right for five years, even if there is no intent to abandon the right. Municipal water rights are exempt from relinquishment, but not from abandonment.

Traditionally, a "beneficial use" of water entailed extracting water from a river or stream. Over time, however, recognition of the importance of ensuring that sufficient water remains within a stream has grown. In 1949, the legislature amended the Fisheries Code to allow water rights to be conditioned or denied if the extraction of water from the stream would harm fish. Then, in the 1960s and 1970s, the legislature recognized that instream uses could be "beneficial" uses under the Water Code. The Water Resources Act of 1971 gave the Department of Ecology the authority to establish minimum instream flow levels before issuing new water rights in a given basin. These "instream flows" are considered water rights with a priority date of the date as of Ecology's adoption of the rule. Instream flow minimums have been established for just

state, thus making the water available for junior appropriators or instream flows.
RCW 90.14.130-180.

The retroactive exemption from relinquishment of a particular class of private water right holders violates the separation of powers. In Department of Ecology v. Theodoratus, 135 Wash.2d 582, 957 P.2d 1241 (1998), the Washington Supreme Court refused to treat a private water supplier as a municipal water supplier with water rights that would be exempt from statutory relinquishment. Id. at 594. By retroactively providing private developers with an exemption from relinquishment that the court rejected in Theodoratus, the legislature is attempting to overrule that court's decision. The expanded definition of municipal water supplier violates the separation of powers, because a statute "cannot be applied retrospectively when it contravenes a construction placed on the original statute by the judiciary. Any other result would make the legislature a court of last resort." In re Detention of Brooks, 145 Wash.2d 275, 284, 36 P.3d 1034 (2001) (citations and internal quotation marks omitted); see also Magula v. Benton Franklin Title Co., Inc., 131 Wash.2d 171, 182, 930 P.2d 307 (1997) ("Any attempt by the Legislature to contravene retroactively this Court's construction of a statute is 'disturbing in that it would effectively be giving license to the [L]egislature to overrule this [C]ourt, raising separation of powers problems.'") (citation omitted).

The retroactivity of this provision of the MWL also violates the substantive due process rights of other water right holders. ~~A law that retroactively impairs vested property rights, violates due process.~~ See State v. Shultz, 138 Wash.2d 638, 646, 980 P.2d 1265 (1999) ("A retroactive law violates due process when it deprives an individual of a vested right.") (citing State v. Hennings, 129 Wash.2d 512, 528, 919 P.2d 580 (1996)); Caritas Services, Inc. v. Department of Social and Health Services, 123 Wash.2d 391, 413, 869 P.2d 28 (1994) ("Due process is violated if the retroactive application of a statute deprives an individual of a vested right.") (citation and internal quotation marks omitted). A vested water right is private property subject to due process protections. Chumstick Creek Drainage Basin in Chelan County v. Department of Ecology, 103 Wash.2d 698, 705, 694 P.2d 1065 (1985); Nielsen v. Sponer, 46 Wash. 14, 15, 89 P. 155 (1907). By exempting certain private water right holders from relinquishment, the effect of the statute is to resurrect water rights that have already been relinquished to the state for nonuse and that would otherwise be available for junior appropriators or instream flows. The statute is unconstitutional because it retroactively impairs the vested rights of junior right holders.

II. ELIMINATION OF THE BENEFICIAL USE REQUIREMENT FOR MUNICIPAL WATER SUPPLIERS (SECTION 6(3)).

The MWL's elimination of the beneficial use requirement for certain water rights violates both due process and the separation of powers. Section 6(3) retroactively eliminates the beneficial use requirement for municipal water suppliers. MWL § 6(3), codified at RCW 90.03.330(3). It is a fundamental precept of western water law that water rights acquired

Jamestown S'Klallam Tribe, Lummi Nation, Makah Indian Nation, Squaxin Island Tribe, Suquamish Tribe, Swinomish Tribe, Tulalip Tribes, Quinault Indian Nation, and Yakama Indian Nation.

The unconstitutional provisions of the MWL retroactively expand some water rights to the detriment of all others. The Petitioners assert that these provisions violate the Due Process Clauses of the U.S. and Washington Constitutions and the doctrine of the separation of powers. We describe below the Petitioners' interests, the MWL, and the constitutional violations that warrant legal action. The Petitioners believe that there are solutions to water management in Washington that do not jeopardize existing rights and existing flows and would welcome the opportunity to discuss the issues raised by this letter.

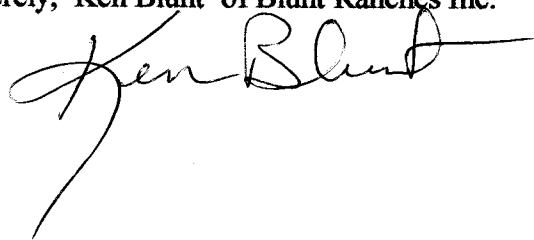
INTERESTS OF PETITIONERS

The Junior Water Right Holders hold water rights that are junior to some of the water rights retroactively expanded by the MWL. Therefore, their water rights will be impaired by the expansion of those senior water rights. For example, Joan Burlingame is a rural property owner and farmer near Ravensdale in King County. She raises horses, sheep, and chickens. She has

To whom it may concern,

In 1956 my father hired a person to build a pit reservoir on a 160 acre parcel of BLM land for livestock water. Some time after we (Blunt Ranches Inc.) had filed on that water right a person from the Department of Interior called me and said that they would require that they become co-owners of that water right. This person made it sound as if there was no other alternative but to agree to share in ownership of this right. I believe that they cunningly compromised my senior vested water right. I was very surprised to find when the State of Montana sent me the bill for the water right fees and a copy of the filed water rights that the Department of Interior had reduced the allocation of my stockwater water right to only .69 acre feet of water and added an allocation for wildlife for 2.77 acre feet. I do not remember them telling me that they were going to divide my filing into two parts and allocate a majority of my water to wildlife. I only remember a request to add their name to the stockwater right that I had filed. The end result was not what I had envisioned.

Sincerely, Ken Blunt of Blunt Ranches Inc.

A handwritten signature in cursive script, appearing to read "Ken Blunt". The signature is written in dark ink and is positioned below the typed name.

STATE OF MONTANA
DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

1424 9TH AVENUE P.O. BOX 201601 HELENA, MONTANA 59620-1601

GENERAL ABSTRACT

Water Right Number: 40E 64284-00 STATEMENT OF CLAIM
Version: 1 -- ORIGINAL RIGHT
Version Status: ACTIVE

Owners: USA (DEPT OF INTERIOR BUREAU OF LAND MGMT)
5001 SOUTHGATE DR
PO BOX 36800
BILLINGS, MT 59107-6800

BLUNT RANCHES INC
PO BOX 945
MALTA, MT 59538

Priority Date: OCTOBER 26, 1956
Enforceable Priority Date: OCTOBER 26, 1956

Type of Historical Right: USE

Purpose (use): STOCK

Maximum Flow Rate: RUNOFF

Maximum Volume: 0.69 AC-FT

Source:

Source Name: UNNAMED TRIBUTARY OF SECOND CREEK
Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr</u>	<u>Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SE	SE	SW	9	24N	29E PHILLIPS

Diversion Means: DAM

Period of Diversion: JANUARY 1 to DECEMBER 31

Reservoir: ON STREAM

<u>Govt Lot</u>	<u>Qtr</u>	<u>Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	SE	SE	SW	9	24N	29E PHILLIPS

Purpose (Use): STOCK

Volume: 0.69 AC-FT

Period of Use: JANUARY 1 to DECEMBER 31

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr</u>	<u>Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			SE	SE	SW	9	24N	29E PHILLIPS

Remarks:

BASED ON THE PARTIES' STIPULATION, OWNERSHIP OF THE WATER RIGHT CHANGED BY ORDER OF THE WATER COURT DURING ADJUDICATION OF THE TEMPORARY PRELIMINARY DECREE.

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DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

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USA (DEPT OF INTERIOR BUREAU OF LAND MGMT)
5001 SOUTHGATE DR
PO BOX 36800
BILLINGS, MT 59107-6800

Priority Date: OCTOBER 26, 1956
Enforceable Priority Date: OCTOBER 26, 1956

Type of Historical Right: USE

Purpose (use): WILDLIFE

Maximum Flow Rate: RUNOFF

Maximum Volume: 2.77 AC-FT

Source:

Source Name: UNNAMED TRIBUTARY OF SECOND CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr</u>	<u>Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SE	SE	SW	9	24N	29E PHILLIPS

Diversion Means: DAM

Period of Diversion: JANUARY 1 to DECEMBER 31

Reservoir: ON STREAM

<u>Govt Lot</u>	<u>Qtr</u>	<u>Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	SE	SE	SW	9	24N	29E PHILLIPS

Purpose (Use): WILDLIFE

Volume: 2.77 AC-FT

Period of Use: JANUARY 1 to DECEMBER 31

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr</u>	<u>Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			SE	SW		9	24N	29E PHILLIPS

Remarks:

BASED ON THE PARTIES' STIPULATION, OWNERSHIP OF THE WATER RIGHT CHANGED BY ORDER OF THE WATER COURT DURING ADJUDICATION OF THE TEMPORARY PRELIMINARY DECREE.

"right to use of water
is tied to grazing permit"

October 30, 2002

Jolene Palmer

Re: Issuance of a 627 (Exempt) Notice of Water Right

Dear Jolene,

As I am unsure of what exactly you are asking, this is the information that I can provide.

1. We cannot issue a water right to you as a BLM lessee. You must have possessory interest in the land to have a water right in your name.
2. Second, you cannot file a water right on a volume of water that already has an existing water right. If you would like me to research an area to see if there are water rights on it, please provide me with the legal land descriptions to include at least one ¼ section and I will get this information to you.
3. Technically, BLM does have an "exempt right" on the Coal Bank Coulee running through property that they own for livestock drinking directly from the source, "pot holes in the coulee". In stream stock use, in use prior to July 1, 1963 was exempted from filing requirements with the DNRC during the adjudication process. *

If you have any questions concerning this information, please do not hesitate to call.

Best Regards,

Ann L. Kulczyk
Water Resources Specialist
Phone No 406-228-2561
Fax No. 406-228-8706
Email - akulczyk@state.mt.us

"pot holes in the coulee"
denied ours

stockwater rules: "govt filing for
prairie potholes"